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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, V. DARCY LLOYD CUMMINGS, Defendant and Appellant.	E028793 (Super.Ct.No. FSB026577) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Michael M. Dest, Judge. Affirmed.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Carl. H. Horst, Supervising Deputy Attorney General, and Lise Jacobson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Darcy Cummings was charged with three counts of robbery (Pen. Code, § 211,[1] counts 1, 2 & 5), one count of grand theft person (§ 487, subd. (c), count 3), and one count of grand theft of personal property (§ 487, subd. (a), count 4). It was further alleged that defendant had four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), three prior prison term convictions (§ 667.5, subd. (b)), and three prior serious felony convictions (§ 667, subd. (a)(1)). Count 2 was dismissed and count 4 was reduced to petty theft after the People and defendant rested.

The jury found defendant guilty of second degree robbery and petty theft as charged in counts 1 and 4, and the lesser offense of petty theft in count 5. The court declared a mistrial as to count 3 because the jury was unable to reach a verdict on that charge. Following the waiver of a jury trial on the prior conviction allegations, the court found all of the prior conviction allegations to be true. On December 12, 2000, defendant was sentenced to state prison for twenty-five years to life for the robbery. Defendant's sentence was enhanced fifteen years for the three section 667, subdivision (a)(1) convictions and three years for each of the three section 667.5, subdivision (b) prior prison commitments. Defendant was given full credit for time served on the misdemeanor convictions. The total term imposed was forty-three years to life.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTS

The Robbery of Myron Detmer (count 1)

On February 27, 2000, defendant approached Myron Detmer, an independent trucker, at the Beacon Truck Stop in Colton and asked him if he wanted to buy some merchandise. Detmer said he did not have any money and was not interested. Later in the afternoon, defendant returned, and Detmer told him that if he wanted to make some money, defendant could help Detmer unload furniture at several locations in Riverside the next day. Defendant agreed to help.

Defendant met Detmer at the truck stop at 4:00 a.m. the next morning. Detmer went inside the convenience store, bought a cup of coffee and withdrew $200 from an automated teller machine (ATM) so he could pay defendant when the work was finished. Defendant and Detmer then left in Detmer's truck. When Detmer started to turn onto a side street, defendant pulled a small revolver out of his pocket, pointed it at Detmer's head, and told Detmer to give him his money. Detmer complied and gave defendant between $250 and $260. Defendant then got out of the truck and fled.

Detmer drove the truck back to the truck stop and had a security guard contact the police. The police arrived, searched the area, but could not find Detmer's assailant. Detmer later described his assailant to a police officer, who prepared a composite sketch based on Detmer's description and another man's statement regarding the assailant's age. Detmer described his assailant as having a crew cut with straight silver hair.

The Theft from Thomas Carlile (count 4)

On April 23, 2000, Thomas Carlile, an independent long distance truck driver, was at the Beacon Truck Stop in Colton. At around 4:45 p.m., a man approached Carlile claiming to be with someone who had computers to sell. The man called over defendant and defendant and Carlile discussed the sale. Carlile agreed to buy a computer for $300 and gave defendant the money. Defendant left and then returned about five minutes later and told Carlile that he had three computers and was willing to sell Carlile another computer for $150. Carlile told defendant and his cohort that he felt he was "being scammed." Defendant stated that he would go get the computer and left the area with the $300 Carlile had given him. The other man momentarily stayed with Carlile and said "Now, [defendant]'s got a gun. Don't follow us." The man then left. Carlile then called the police.

A few weeks later, defendant came up to Carlile's truck at the Beacon Truck Stop. Defendant, upon recognizing Carlile, ran away. Carlile then called the police.

The Theft from Lorne Chapman (count 5)

On April 29, 2000, at around 8:15 a.m., defendant approached another truck driver at the Beacon Truck Stop, Lorne Chapman, and asked him if he wanted to buy a cell phone or a nine-millimeter pistol. Chapman said no to both offers and went inside the convenience store and bought a cup of coffee.

When Chapman exited the convenience store, defendant approached him and asked if he wanted to buy a laptop computer. Chapman expressed interest in the computer and the two walked around to the other side of the building and negotiated a price. Chapman agreed to pay $150 and asked to see the computer. Defendant suggested that Chapman accompany

defendant to a motel to see it. Chapman refused. Defendant responded that he would have someone bring the computer to the truck stop, and then made a phone call.

About a minute after defendant's phone call, a car arrived that defendant claimed to have the computer. When the car pulled up, Chapman gave defendant $150. Defendant then acted like he was going to retrieve the computer from the car and jumped into the car and drove away. Chapman subsequently called the police and reported the theft.

Chapman testified that he gave the money to defendant and did not try to stop him because he knew defendant had a gun. During their conversation, defendant pulled his jacket to the side, exposing the handle of what appeared to be a revolver. Defendant told Chapman the gun was "a .32 revolver."

Appellant's Arrest

On May 21, 2000, defendant approached Carlile's truck at the Beacon Truck Stop and fled upon recognizing Carlile. Carlile immediately called the police. Police Officer Charles Burrows was dispatched in response to Carlile's call. Officer Burrows spotted defendant, who was walking away from the Beacon Truck Stop, and noticed that defendant resembled the composite sketch of the man suspected of robbing Detmer. Officer Burrows drove next to defendant and asked if he could talk to him, to which defendant agreed. Officer Burrows asked defendant where he was going. Defendant stated that he was taking a shortcut to a restaurant in San Bernardino. Officer Burrows informed defendant that he was actually taking a longer route.

Officer Burrows also questioned defendant as to where he had come from. Defendant said he had come from a truck stop, and, in response to Officer Burrows's

further questions, that this was the first time he had ever been to the truck stop and he did not know anyone there. During this conversation, Officer Burrows called for backup assistance.

Meanwhile, a backup officer picked up Carlile at the truck stop for an infield showup. Officer Burrows arrested defendant after Carlile positively identified defendant as the man who had stolen his money. After Officer Burrows again asked defendant if defendant had any weapons, defendant stated that he had a toy gun in his pocket. Officer Burrows searched defendant and found the toy gun in defendant's pocket. The tip of the toy gun, which was originally bright orange, was darkened to make the gun look real. Detmer testified that the toy gun looked like the gun that defendant had pointed at him and Chapman testified the handle of the toy gun looked similar to the gun handle he saw protruding from defendant's waistband.

After this search, Officer Burrows informed defendant that he was being arrested for robbery. Defendant responded that he "couldn't have possibly been [*sic*] involved in that" crime. Officer Burrows asked him what he meant by "involved in that." Defendant replied, "[s]ome guy conned somebody out of this money having something to do with a stolen computer." Officer Burrows reminded defendant that he had stated that he had only been at the truck stop one time. Defendant said he had forgotten that he had actually been to the truck stop two or three times before. At this point, Officer Burrows handcuffed defendant and read defendant his *Miranda*[2] rights, which defendant invoked.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Defendant was then transported to the police station for booking and was readvised of his *Miranda* rights by Officer Burrows. During this time, defendant stated that it was unfair he was being arrested based on someone else's claim to have been "ripped off over the sale of a computer . . . ." Defendant also asked Officer Burrows how many robberies he was suspected of committing. When Officer Burrows stated that he was being investigated for several robberies, defendant asserted that was not possible because he had only been to the Beacon Truck Stop three or four times.

Photographic Lineup

In May 2000, Officer Ken Schiller was assigned to investigate the series of crimes at the Beacon Truck Stop. Based on the information from the police reports regarding these crimes, Officer Schiller prepared a photographic lineup consisting of all White males with various hair colors and styles. The differences in hair color were a result of the witnesses' various descriptions of the suspect. Officer Schiller sent the photographic lineup to Myron Detmer and Lorne Chapman, who both identified defendant's photograph in the lineups.

DISCUSSION

1. The Admissibility of Defendant's Extrajudicial Statements

Defendant contends that his admissions to Officer Burrows should have been excluded because defendant had neither been advised of his *Miranda* rights nor waived them and Officer Burrows's words and actions constituted the functional equivalent of custodial interrogation. *Miranda v. Arizona, supra,* 384 U.S. 436 requires that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from

custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently." (*Id.* at p. 444.) All of these rights are referred to generally as his *Miranda* rights.

An Evidence Code section 402 hearing was held to determine whether defendant's admissions to Officer Burrows were admissible. Defendant argued that the statements made prior to his being advised of his *Miranda* rights should be excluded because he was subject to custodial interrogation. He also argued that the admission made after he was advised of his *Miranda* rights should be excluded because he had not waived his *Miranda* rights. The prosecutor argued that the statements made before and after he was advised of his *Miranda* rights were volunteered and thus admissible. The trial court ruled that defendant's statements up until he stated he had forgotten he had been to the truck stop two or three times were admissible because defendant volunteered them, whereas the statements made after the officer's question constituted interrogation and, as a result, defendant's responses were inadmissible.

A. The Pre-*Miranda* Statements

Defendant contends that Officer Burrows's questions directed at defendant while defendant was in custody (he had already been arrested), which were made in response to

defendant's voluntarily made statements, violate *Miranda*. We agree with defendant that the trial court erred in allowing these pre-*Miranda* statements into trial.

Defendant after being arrested, but before being advised of his *Miranda* rights, stated that "he couldn't have possibly been involved in that crime." Officer Burrows then questioned defendant as to what crime he was referring to. Defendant replied, "[s]ome guy conned somebody out of this money having something to do with a stolen computer." Officer Burrows then reminded defendant that defendant had told him he had only been to the truck stop once and he did not know anybody there. Defendant stated that he must have forgotten and he had been there two or three times.

The *Miranda* warning is required the moment the suspect is subjected to custodial interrogation. (*People v. Mickey* (1991) 54 Cal.3d 612, 648.) A *Miranda* warning is required when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda v. Arizona*, *supra*, 384 U.S. 436, 444, fn. omitted.) "'Interrogation' consists of express questioning, or words or actions on the part of the police that 'are reasonably likely to elicit an incriminating response from the suspect.' [Citations.] 'The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 993.)

The standard as to what amounts to interrogation "is whether 'under all the circumstances involved in a given case, the questions are "reasonably likely to elicit an incriminating response from the suspect."' [Citation.] This is an objective standard." (*People v. Wader* (1993) 5 Cal.4th 610, 637.)

In this situation, by asking defendant what crime he was referring to, a reasonable police officer could only expect that an incriminating response would be forthcoming from defendant. In fact, it is difficult to fathom a response to Officer Burrows's inquiry that would not tend to incriminate defendant.

Moreover, "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless by excluded from evidence under *Miranda*." (*Oregon v. Elstad* (1985) 470 U.S. 298, 307.) Although defendant's statements in response to Officer Burrows's question might have been admissible if defendant had been informed of his *Miranda* rights, they should be excluded because of the presumption of compulsion that arises in the absence of a proper *Miranda* warning.

Therefore, because Officer Burrows had yet to inform defendant of his *Miranda* rights and Officer Burrows's questioning was reasonably likely to elicit an incriminating response, defendant's statements made subsequent to his arrest, but before being advised of his *Miranda* rights, should have been suppressed.

B. The Post-*Miranda* Statements

Defendant also contends that his statements made to police after he invoked his *Miranda* rights should have been suppressed. While enroute to the police station in the patrol car, defendant asked Officer Burrows how many robberies he was being investigated for. Officer Burrows stated that defendant was being investigated for several robberies, to which defendant replied "I have only been at the truck stop three or four times." Further, when defendant was being booked at the station, defendant stated that it was not fair he was

being arrested because somebody said they got "ripped off over the sale of a computer . . . ." Officer Burrows responded that he was investigating a robbery involving a truck driver.

Once a defendant invokes his right to counsel, "'"the interrogation must cease until an attorney is present."' [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033-1034.) However, "*Miranda* does not 'prohibit the police from merely listening to . . . voluntary, volunteered statements' uttered by a person, whether or not in custody, 'and using them against him at the trial' . . . . [Citation.]" (*People v. Mickey, supra*, 54 Cal.3d 612, 648.)

The statements defendant made after he invoked his *Miranda* rights were made of defendant's own volition, without any prodding from Officer Burrows. Officer Burrows made no inquiries that would have reasonably led to an incriminating response from defendant. Rather, Officer Burrows merely listened to defendant's volunteered statements and answered defendant's questions concerning his arrest. As such, we hold that the trial court did not commit error in admitting these statements into evidence.

C. Prejudice

As we have held that the pre-*Miranda* statements defendant made should not have been allowed at trial, we must now determine whether this error was harmless beyond a reasonable doubt. (*People v. Sims* (1993) 5 Cal.4th 405, 447; *People v. Cunningham, supra*, 25 Cal.4th 926, 994 [applying the harmless-beyond-a-reasonable-doubt federal standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 to *Miranda* error].)

Under the harmless beyond a reasonable doubt standard, we conclude that the error was not prejudicial. The pre-*Miranda* statements wrongly allowed in at trial are virtually

identical to the post-*Miranda* statements. Both sets of defendant's statements demonstrate that defendant knew the robberies involved the sale of computers and defendant had been to the truck stop three or four times. As the substance of the pre-*Miranda* statements was admitted at trial through the post-*Miranda* statements, no prejudice exists.

2. The Photographic Lineup

Defendant also contends that the trial court should have excluded the photographic lineup and the in-court identification of defendant because the photographic lineup was impermissibly suggestive, thus tainting the out-of-court and the in-court identifications. An Evidence Code section 402 hearing was held to determine the fairness of the photographic lineup. At the hearing, Colton Police Office Ken Schiller testified that, following defendant's May 21 arrest, he compiled a six-pack photographic lineup with photographs of parolees and defendant. Officer Schiller selected the photos based on the descriptions provided by the victims.

The victims described the suspect as a tall or average height thin White male. Detmer stated that the man who robbed him had a gray crew cut. Bennet described his assailant as having blond hair while Chapman said his assailant had black hair. Based on these descriptions, Officer Schiller selected (along with defendant's photograph) one person with gray hair, one with red hair, one with blonde hair, and two with dark or black hair. Defendant was the only person with short gray hair. All of the photographs were of White males.

The photographic lineup was mailed to Detmer, Bennet, and Zimmer, along with an admonition stapled to it stating that the person who committed the crimes under

investigation may or may not be in the lineup, and to bear in mind hairstyles and facial hair can easily be changed, and it is just as important to free innocent people from suspicion as to identify guilty ones. All of the victims identified defendant as their assailant. At the hearing, defendant moved to suppress Detmer's identification of defendant's photograph in the lineup and any subsequent identifications that Detmer made or would make on the ground that the lineup was unduly suggestive. The court found that the lineup was not unduly suggestive and the identification was admissible.

"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.] [¶] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*People v. Cunningham, supra,* 25 Cal.4th 926, 989.)

Here, the photographic lineup was not unduly suggestive. Defendant's photograph was similar to every other photograph, except in regards to hair color and hair style. The admonition given to the victims noted that hair color and styles, as well as facial hair, may

change. In defendant's photograph, defendant had facial hair, whereas the other gray-haired man did not. The court observed that Detmer did not describe his assailant as having facial hair. Based on these circumstances, we hold that the court properly found the photographic lineup was not unduly suggestive.

Further, even if the photographic lineup was unduly suggestive, a "'substantial likelihood of irreparable misidentification' under the '"'totality of the circumstances'"'" must exist in order for a reversal to be warranted. (*People v. Cunningham, supra*, 25 Cal.4th 926, 990.) In the present case, there is no substantial likelihood that Detmer misidentified defendant when he viewed the six photographs or when he identified defendant at trial.

As the respondent points out, Detmer had the chance to view defendant on February 27 when defendant offered to sell Detmer merchandise and Detmer offered defendant work and on February 28 when Detmer met with defendant in order for defendant to help Detmer unload furniture and subsequently robbed Detmer at gunpoint. Later that day, Detmer provided information for a composite sketch of his assailant. This composite closely resembled defendant. Detmer, upon receiving the photographic lineup, circled defendant's photograph. Defendant has not met his burden of establishing unreliability in the totality of the circumstances under federal constitutional standards. (See *People v. Cunningham*, *supra*, 25 Cal.4th 926, 990.) Thus, because the photographic lineup was constitutional, Detmer's in-court identification of defendant was also permissible.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

WARD
J.